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No. 90-1619

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PINEHURST AREA REALTY CO., INC.,
Petitioner,

v.

THE VILLAGE OF PINEHURST,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent, The Village of Pinehurst, respectfully submits that a writ of certiorari to review the judgment of the North Carolina Supreme Court and the opinion of the North Carolina Court of Appeals in this matter is unnecessary and should not issue.

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STATEMENT OF THE CASE[1]

Petitioner, Pinehurst Area Realty, is the developer of Midland Country Club, which in addition to privately-owned residential units includes a golf course and club house owned by Petitioner (the "golf course tract"). Petitioner also owns an adjoining tract upon which both its real estate office and a former filling station are situated (the "office tract"). Petitioner instituted this action challenging certain zoning actions by Respondent, Village of Pinehurst ("the Village"), on state and federal constitutional grounds. Petitioner seeks a Writ of Certiorari based on what it alleges to be federal constitutional questions.

[1]At the outset, Respondent notes that Petitioner has not complied with Rule 29.4(c) of the Rules of the Supreme Court of the United States requiring Petitioner to notify the North Carolina Attorney General that Petitioner is challenging the constitutionality of a statute of the state of North Carolina, which notice is to be accompanied with service of a copy of its Petition on the North Carolina Attorney General. Further, Petitioner has not recited in its Petition that 28 U.S.C. § 2403(b) may be applicable.

1985 Zoning

Both the golf course tract and the office tract are located in Moore County and were originally under the zoning jurisdiction of the County. The County had zoned the country club tract in a zoning district designated RD (Residential). The front 500 feet of the office tract was zoned B-1 (Business) by the County, while the remainder of the office tract was part of the area zoned RD. In June 1985, the North Carolina General Assembly enacted legislation to allow the Village of Pinehurst, the Town of Southern Pines and the Town of Aberdeen to extend their extraterritorial zoning jurisdiction up to two miles beyond their respective corporate limits.

Later that month, pursuant to that delegated authority, the Village of Pinehurst published notice of a public hearing to be held July 8, 1985 to consider a "proposed area for addition to the extraterritorial zoning jurisdiction of the Village." This published notice described the proposed areas by metes and bounds and made reference to the availability of the map showing the proposed zoning. This area proposed to be added to the extraterritorial zoning jurisdiction of the Village included Petitioner's golf course tract

and office tract. After holding the public hearing, the Village extended its extraterritorial zoning jurisdiction and initially placed the office tract in a district designated OP ("Office Professional") while placing the golf course tract in a district designated PCR ("Public Conservation and Recreation"). As Petitioner admits, Petitioner and its representatives "did not attend this public hearing; it was already aware of the area to be included in the extraterritorial jurisdiction of the Village, and knew that its property was to be included." Petition for a Writ of Certiorari at 8.

Petitioner makes much of the fact that the PCR zoning designation "permits only golf courses, riding trails, nature preserves, sewer lift stations, and other non-developed uses." Id. at 10. Petition also laments that the "OP zoning classification permits only limited commercial development such as small professional offices." Id. What Petitioner neglects to point out is that both of these designations permitted ***the existing use of the tracts at the time of the extension of the extraterritorial zoning jurisdiction of the Village***. The PCR tract was already a golf course. The OP tract was already a small professional office. Therefore, although the zoning designations may have been

more restrictive than the Petitioner would have liked, they reflected the existing use of the property.

Petitioner alleges in its Complaint that it did not learn of the zoning classification until June 1986, but Petitioner has admitted that it knew that the property was to be included in the extraterritorial zoning jurisdiction of the Village pursuant to the legislation of the North Carolina General Assembly and subsequent to the public hearing which Petitioner chose not to attend.

The 1987 Rezoning

In January 1987, Petitioner officially requested that its office tract be rezoned from OP to NC ("Neighborhood Commercial"). After several meetings with representatives of Petitioner and after published notice and a public hearing, the Village amended its zoning ordinance to break its former NC classification into two new classifications, NC-1 and NC-2. The Village then rezoned the office tract into a NC-2 district. The NC-2 designation was even less restrictive than OP, and as before, it continued to permit the existing use of the office tract.

Procedural History

In March 1988, Petitioner filed suit, challenging both the initial 1985 zoning and the 1987 rezoning of its office tract on state and federal due process grounds.

The Village moved to dismiss the complaint for failure to state a claim for which relief could be granted. Before the hearing date for this Motion to Dismiss, Petitioner filed a Motion for Summary Judgment. The trial court orally granted Respondent's motion and denied Petitioner's motion. Before the trial court issued a written order, Petitioner filed a Motion for Reconsideration. The trial court denied this motion, and Petitioner filed an appeal which was heard in the North Carolina Court of Appeals. See Pinehurst Area Realty, Inc. v. Village of Pinehurst, 100 N.C. App. 77, 394 S.E.2d 251 (1990).

The North Carolina Court of Appeals affirmed the grant of the motion to dismiss for failure to state a claim upon which relief could be granted and the denial of Petition's Motion for Summary Judgment. The Petitioner then sought review in the North Carolina Supreme Court, but that court denied Petitioner's Petition for Discretionary

Review and dismissed Petitioner's purported appeal as of right upon finding that ***Petitioner did not have any claim based on a constitutional question***. See Pinehurst Area Realty, Inc. v. Village of Pinehurst, 328 N.C. 92, 402 S.E.2d 417 (1991).

Petitioner now seeks review of this 1985 legislative decision by the Village Council of the Village of Pinehurst in this honorable Court. Respondent respectfully submits that this Court should deny Petitioner's Petition for a Writ of Certiorari.

SUMMARY OF RESPONDENT'S ARGUMENT

This dispute involving legislative decisions of the Village Council of Respondent does not present the type of question or questions worthy of the resources of this honorable Court for several reasons.

Petitioner's claims as to the office tract have been rendered moot by subsequent legislative decisions of the Village Council.

The arguments raised by Petitioner's questions presented to this Court in its Petition for a Writ of Certiorari involve attempts to turn alleged state procedural deficiencies into federal constitutional questions.

Even if Petitioner's legal gymnastics do present federal constitutional questions, review by this Court would be unwarranted because there are ***independent state grounds*** which support the trial court's decision to grant a motion to dismiss regardless of the resolution of the purported federal

constitutional questions which Petitioner seeks to have reviewed in this Court.

Further, review by this Court would be futile in that Petitioner seeks to undo a legislative decision which could properly be remade through another zoning ordinance by the Village Council; if Petitioner would like a different zoning classification for its property, Petitioner may proceed through the appropriate legislative channels to seek to have the property rezoned, so Petitioner is not without recourse.

Furthermore, this case is not appropriate for Supreme Court review because Petitioner has no property interest in the zoning designation which would entitle it to federal due process. Petitioner could not have any realistic expectation that its property would never have been rezoned as it is clear that the state legislature has delegated to cities the authority to zone and rezone property.

It is also clear that even if Petitioner were entitled to due process, Petitioner received all of the notice that it was due because the notice which is given need only be sufficient to put a property owner on notice that changes will be made effecting his property.

Finally, Petitioner does not have a viable taking claim because the zoning regulation has not precluded Petitioner from all economic opportunities with respect to the property, nor has the zoning resulted in a permanent physical occupation of the property.

ARGUMENT

Mootness

The claim brought by Petitioner with regard to the initial 1985 zoning of the office tract was appropriately dismissed because Petitioner's dispute in connection with that rezoning is moot. The Village properly rezoned that tract NC-2 in 1987 as it had authority to do so under state zoning statutes, and thus Petitioner as a matter of law no longer has any cognizable claim based on the 1985 zoning of the office tract. In Johansen v. City of Bartlesville, 862 F.2d 423 (10th Cir. 1988), defendant city rezoned property allegedly in violation of state notice requirements. Plaintiffs' suit was dismissed. Pending appeal, the city rescheduled the zoning matter for hearing and gave proper notice to all parties. After the hearing, the city voted to adopt the disputed zoning. The court held that the second hearing, which corrected the procedural defects allegedly presented in the first hearing, rendered plaintiffs' claims moot.

Respondent submits that the 1985 zoning amendment was free of procedural defects; however, even if this Court were to hold otherwise, the subsequent rezoning of the office tract into an NC-2 district rendered moot any claims as to defects which might have been present in the 1985 zoning. Thus, on these grounds, Petitioner's challenge to the 1985 zoning of the office tract was properly dismissed.

In its complaint, Petitioner purported to challenge the 1987 rezoning as well. Petitioner's Complaint was filed within nine months of the adoption of the 1987 zoning amendment affecting Petitioner's land. The trial court's grant of Respondent's motion to dismiss and the opinion of the North Carolina Court of Appeals make clear that this portion of Petitioner's claim was dismissed for the failure to state a claim for which relief could be granted, not based on any statute of limitations. Further, Petitioner's questions presented to this Court concern the 1985 zoning and not the 1987 rezoning. Thus, the only remaining challenge would appear to be in regards to the country club tract zoning of 1985.

State Court Decision Supportable On Grounds Other Than Statute of Limitations

In its second question presented, Petitioner appears to argue that its property interest in a cause of action was denied without due process of law by the application of a nine-month statute of limitations to its claims. The North Carolina Court of Appeals, however, in its opinion clearly stated that the notice was sufficient, so Petitioner's claims were ***considered and resolved on grounds other than the application of the statute of limitations.*** As the North Carolina Court of Appeals stated:

> Plaintiff challenges the validity of the zoning on state constitutional grounds, arguing that the defendant failed to properly notify it of the impending zoning action affecting its property in violation of N.C.G.S. § 160A-364. In fact, defendant's published notice of the zoning action stated that the Village would consider extending its extraterritorial zoning jurisdiction, and the metes and bounds description included the land owned by appellant. That description put plaintiff on notice that changes would be made affecting its property.

100 N.C. App. at 80, 394 S.E.2d at 253.

Petitioner Had Adequate Notice

In fact, in its petition to this Court, Petitioner admits that it had notice of the July 8, 1985 public hearing concerning the extraterritorial zoning jurisdiction of the Village -- "PAR did not attend this public hearing; it was already aware of the area to be included in the extra-territorial jurisdiction of the Village, and it knew that its property was to be included." Petition for Writ of Certiorari at 8.

Futility of Supreme Court Review

Consideration of the questions allegedly presented by this case by this honorable Court is also unwarranted in that such consideration would be futile. Even though Respondent asserts that Petitioner received adequate notice of the zoning hearing, Petitioner challenges the procedure by which this legislative decision was made. Even if Petitioner should ultimately prevail in this action, Respondent could initiate rezoning proceedings and rezone the property pursuant to legislative authority delegated to it. In fact, were Respondent to pursue rezoning the country club tract at this time, Respondent would send notice to Petitioner by

first-class mail not only because such a practice would be prudent after such protracted litigation, but also because the North Carolina General Assembly amended the statutes regarding zoning procedures for all such zoning amendments after October 1, 1985. See 1985 N.C. Sess. Laws Ch. 595 (App. p. 7). The statutes, thus, now require that notice be mailed to landowners such as Petitioner. See N.C. Gen. Stat. § 160A-384. Furthermore, Petitioner is not without recourse aside from this litigation because Petitioner may seek to have its property rezoned at any time by pursuing rezoning procedures in the legislative branch of government.

Full Authority To Zone

Petitioner asserts that the Village "had no authority to enact the ordinance it claims to have enacted [because] the County and General Assembly of North Carolina did not delegate power to the Village of Pinehurst to zone that territory until seven days after the ordinance was allegedly adopted." Petition for Writ of Certiorari at 19-20. This argument misconstrues both the legislation passed by the General Assembly and the ordinance passed by the Village Council.

The Act Relating to Extraterritorial Zoning Jurisdiction of the Village of Pinehurst passed by the General Assembly provides that "the Village of Pinehurst . . . may exercise the powers granted by this Article for a distance of not more than two miles beyond [its] corporate limits, without regard to the population limitations of this subsection." 1985 N.C. Sess. Laws Ch. 308, s.1 (App. p. 1) (emphasis added). There are no conditions to this authority.

The reference to approval by the Moore County Board of Commissioners in Section 2 of this Act relates to the assertion of extraterritorial zoning authority into areas previously zoned by Moore County after annexation proceedings by the Village of Pinehurst. Such approval was not required before exercising extraterritorial zoning authority in the two miles beyond the corporate limits of Pinehurst as they existed at the time of enactment of the legislation. Thus, the approval granted by the Moore County Board of Commissioners on July 22, 1985 was not necessary for the office tract or the country club tract.

At any rate, the Ordinance Providing for the Extraterritorial Limits of the Village of Pinehurst attached as Exhibit D to Petitioner's Complaint, the applicable

ordinance passed by the Village Council, provided that "[t]his ordinance shall be deemed to be in full force and effect from and after the 15th day of July, 1985 and approval by the Moore County Board of Commissioners for those areas where such approval is required." (App. p. 3) (emphasis added). Thus, even if such approval was required, the ordinance provided on its face that it would not be effective until after that approval was granted.

No Federal Constitutional Claim

While Respondent suggests that this Court should not grant Petitioner's Petition for a Writ of Certiorari because of the mootness, futility, and the lack of a significant federal question, Respondent further asserts that this Court would not even have to address the issue of the proper statute of limitations in a zoning case involving a federal constitutional question because ***Petitioner has failed to state a claim under federal constitutional law***. The North Carolina Supreme Court determined that Petitioner's claims involved no substantial question arising under either the state or federal constitutions when it granted Respondent's motion to dismiss Petitioner's appeal asserted to be an appeal as of

right based on a constitutional question. See 328 N.C. 92, 402 S.E.2d 417 (1991) (reprinted as Appendix A, App. pp. 1-2, of Petitioner's Petition for Writ of Certiorari).

To have a property interest protected by the federal Constitution, a person must have more than an ownership interest in the property; he must have a legitimate claim of entitlement. See Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). This entitlement must arise from an independent source, either by contract or by state law. Under North Carolina law, Petitioner had no entitlement to keep the zoning designation established by Moore County before the Village's exercise of its extra-territorial zoning jurisdiction. See N.C. Gen. Stat. § 160A-381 (1987) (granting cities the authority to regulate usage, density and location through zoning). Petitioner's Complaint alleges no facts that would give it a constitutionally protected property interest in the zoning designation that it had under Moore County's zoning authority. See Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235, 1243 (E.D. La. 1987); Keiger v. Board of Adjustment, 281 N.C. 715, 190 S.E.2d 175 (1972) (a property owner has no right to a particular type of zoning designation until it (1) acquires building permits and (2) makes

substantial expenditures in good faith reliance on the existing zoning ordinance).

Not Subject To Federal Due Process Requirements

Moreover, zoning decisions as a matter of law are not subject to federal due process requirements. North Carolina courts have repeatedly characterized zoning as a legislative action, rather than a judicial action. See, e.g., Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, disc. rev. denied, 318 N.C. 417, 349 S.E.2d 600 (1986); see also Shelton v. City of College Station, 780 F.2d 475 (5th Cir.), cert. denied, 477 U.S. 905, 106 S. Ct. 3276, 91 L. Ed. 2d 566 (1986) (local zoning actions are considered legislative actions for purposes of due process under the federal constitution); Q.C. Const. Co. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986) (lack of notice and hearing; no due process claim because zoning is a legislative act). A violation of state law is not necessarily a constitutional violation. See, e.g., Smith v. City of Picayune, 794 F.2d 482 (5th Cir. 1986); Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235 (E.D. La. 1987); Dean

Tarry Corp. v. Friedlander, 650 F. Supp. 544 (S.D.N.Y.), aff'd, 826 F.2d 210 (2d Cir. 1987).

Even if Petitioner did have a protected property interest in the Moore County zoning designation, which Respondent firmly denies, ***local zoning decisions are not subject to federal procedural due process requirements***. The United States Supreme Court made it clear in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1950), that a deprivation of property that is a result of a legislative enactment is not subject to federal procedural requirements of due process:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected the only way that they can be in complex society by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual government in such matters if the government is to go on.

Id. at 445, 35 S. Ct. at 142, 60 L. Ed. at 375. Such is the case here. This was a legislative decision involving a large expanse of land, not just Petitioner's tract. Notice was given to the whole community, and many people attended the public hearing. This legislative decision affected a large number of people. It was not a decision targeted at Petitioner.

Proper Notice Was Given

Further, Respondent asserts that even if Petitioner was entitled to due process under the federal Constitution with respect to the 1985 zoning by the Village, Petitioner received the required notice and an opportunity to be heard. The published notice stated that the Village would meet to extend its extraterritorial zoning jurisdiction, and the metes and bounds description included the land owned by Petitioner. To be adequate, notice of a zoning action need not describe precisely what will take place at the hearing; it is enough that the description would put a property owner on notice that changes will be made affecting his property. See, e.g., Walker v. Town of Elkin, 254 N.C. 85, 118 S.E.2d 1 (1961); Stutts v. Swaim, 30 N.C. App. 611, 228 S.E.2d 750, disc. rev. denied, 291 N.C. 178, 229 S.E.2d 692 (1976). The

North Carolina Supreme Court has explained what notice is sufficient in zoning cases:

> Ordinarily, if the ordinance or amendment as finally adopted contains alterations substantially different (amounting to a new proposal) from those originally advertised and heard, there must be additional notice and opportunity for additional hearing. However, no further notice or hearing is required after a properly advertised and properly conducted public hearing when the alteration of the initial proposal is insubstantial. . . . Moreover, additional notice and public hearing ordinarily will not be required when the initial notice is broad enough to indicate the possibility of substantial change and substantial changes are made of the same fundamental character as contained in the notice, such changes resulting from objections, debate and discussion at the properly noticed initial hearing.

Heaton v. City of Charlotte, 277 N.C. 506, 518, 178 S.E.2d 352, 359-60 (1971), quoted in In re Application of Raynor, 94 N.C. App. 91, 97, 379 S.E.2d 880, disc. rev. denied, 325 N.C. 707, 388 S.E.2d 448 (1989).

Under this standard, the notice provided by Respondent was adequate. Petitioner admits knowing about this public hearing. Further, the minutes of this public

hearing make clear that other property owners similarly situated to Petitioner understood that new zoning designations would be discussed along with the extension of the extraterritorial zoning jurisdiction of Respondent because various citizens rendered their opinion on the various zoning designations. (App. p. 9; portions of these minutes were attached as an exhibit to Plaintiff's Complaint).

Even if this notice was insufficient, it is North Carolina state statutes that impose a notice requirement. See N.C. Gen. Stat. §§ 160A-364 & -384 (1987). It is well-established that "the mere failure to follow state law procedures will not support a claim under the United States Constitution." Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235, 1248 (E.D. La. 1987). It is axiomatic that not every violation of the state's statute amounts to an infringement of a constitutional right . . . and courts have repeatedly rejected similar attempts to create a constitutional question out of a state law violation in the land use area. Dean Tarry Corp. v. Friedlander, 650 F. Supp. 551, 554 (S.D.N.Y.), aff'd, 826 F.2d 210 (2d Cir. 1987).

No Taking Claim

Petitioner also seeks to turn this case into a taking question. See Petition for Writ of Certiorari at 22-26. However, ***the zoning decision in this case clearly does not rise to the level of a taking.*** In its Petition for a Writ of Certiorari, Petitioner admits that the PCR District, the zoning designation given to the golf course tract, permits "golf courses, riding trails, nature preserves, sewer lift stations, and other non-developed uses." Petition at 10. As such, it permits the exact use established by Petitioner. Although North Carolina has an established doctrine of nonconforming uses, Petitioner need not even take advantage of that doctrine because its use from 1985 through the present continues to be that of a golf course, a permitted use under both the Moore County and Village of Pinehurst zoning classifications. Petitioner has not been denied the opportunity to make economically viable use of the property.

Petitioner relies on what it deems to be an "analogous" case -- Fred F. French Investment Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976), cited in

Petition for Writ of Certiorari at 26. However, that case was decided before the United States Supreme Court's decision in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), in which this Court held that a zoning regulation does not give rise to a taking when the landowner still has legally permissible uses which provide an opportunity for the landowner to obtain a "reasonable return" on its investment. Id. at 136, 98 S. Ct. at 2665, 57 L. Ed. 2d at 656; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

Further, Petitioner has not alleged a permanent physical occupation of the property which would amount to a taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). "It is insufficient for plaintiff to show only that the regulation deprives him of the best use of his property or that the regulation has caused a severe decrease in the value of his property." Goldblatt v. Town of Hempstead, 369 U.S. 590, 592, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).

Need For Finality On Public Policy Grounds

In the final analysis, Petitioner seeks to have a three-year statute of limitations apply to all zoning decisions. Policy reasons mitigate against such a statute of limitations. In the usual tort situation, there is not the same need for finality that is present in a zoning situation. A three-year statute of limitations, although inconvenient, does not prevent potential defendants in tort actions from going forward with their plans. In contrast, a three-year statute of limitations for zoning challenges would effectively paralyze not only the defendant municipality, but also homeowners, businesses, developers, and other interested persons. It would be foolish to take any action with respect to a newly-zoned piece of property until three years had elapsed and the party could be sure that the zoning decision was safe from challenge.

The strong need for finality with respect to zoning matters supports a policy of limiting the time period in which challenges to zoning may be brought. Moreover, if the three-year statute of limitations were applied to "federal" challenges to zoning ordinances, the nine-month period provided by North Carolina statute would become a nullity.

Every plaintiff who sought to challenge an ordinance could merely add some allegation that his "federal constitutional rights" had been violated and thereby be given an additional two years and three months within which to file his complaint.

It should be pointed out that the statute of limitations for zoning decisions never really runs out in that a landowner may always seek to have his property rezoned by the county or municipality through the regular legislative process. Zoning decisions are thus not similar to termination of creditors rights in probate proceedings analyzed in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1987), on which Petitioner seeks to rely. A creditor in the Oklahoma probate court, unlike a North Carolina landowner, was forever barred from bringing a claim against the estate of a decedent if not brought within two months after publication of notice to creditors. The Oklahoma executor sought to rely on published notice to begin the two-month period, and it was the sufficiency of that notice which was at issue. In this case, any statute of limitations which does begin to run commences with the zoning decision and not with the issuance of notice. And, at no time is a North

Carolina landowner barred from seeking rezoning of his property.

CONCLUSION

State procedural matters and legislative decisions such as zoning matters do not lend themselves to questions worthy of the resources of this Court for review of significant federal constitutional questions. Although Petitioner asserts that various Fifth and Fourteenth Amendment rights have been deprived without due process of law, it is clear that much of the dispute has been rendered moot by subsequent rezoning decisions and that consideration of the remaining questions would be futile because of their legislative nature.

Petitioner has not presented a colorable taking claim because Petitioner still has substantial economic opportunities; indeed, Petitioner still may legally make use of the property in the original manner in which it chose to develop the property under the Moore County zoning

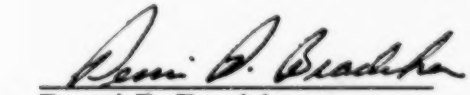
designation which is substantially similar to the current Pinehurst zoning designation.

Although there are multiple reasons which support the trial court's decision to grant Respondent's motion to dismiss the complaint for failure to state a claim, Petitioner basically argues that his cause of action has been unconstitutionally deprived by a statute of limitations which bars his claim. However, Petitioner is not without recourse as the original decision complained of was a legislative decision which may be reversed through the regular channels of the legislative branch of government at any time.

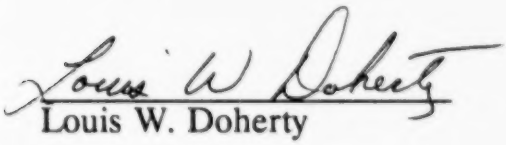
Finally, as is clear from a review of the questions presented, this petition for writ of certiorari does not raise the sort of "important question of federal law which has not been, but should be, settled by this Court," nor has Petitioner shown that this decision of the North Carolina Court of Appeals "has decided a federal question in a way that conflicts with the decision of another state court of last resort." Rules of the Supreme Court of the United States Rule 10.1.

For the foregoing reasons, Respondent urges this Court to deny Petitioner's petition for a writ of certiorari.

Respectfully submitted, this the 9th day of May, 1991.



Penni P. Bradshaw
Counsel of Record



Louis W. Doherty

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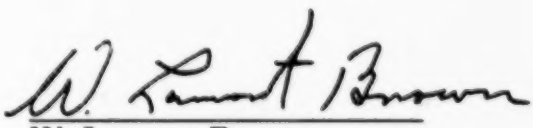
(919) 725-2351



W. Lamont Brown

OF COUNSEL:
Brown, Robbins, May, Pate,
Rich, Scarborough & Burke
Post Office Box 370
Pinehurst, NC 28374

(919) 692-4900

Attorneys for Respondent

APPENDIX A

CHAPTER 308

S.B. 343

AN ACT RELATING TO THE EXERCISE OF EXTRATERRITORIAL PLANNING POWERS BY THE TOWN OF ABERDEEN, THE VILLAGE OF PINEHURST AND THE TOWN OF SOUTHERN PINES IN MOORE COUNTY.

The General Assembly of North Carolina enacts:

Section 1. G.S. 160A-360(a) is amended by adding a new sentence at the end to read:

"The Town of Aberdeen, the village of Pinehurst and the Town of Southern Pines may exercise the powers granted by this Article for a distance of not more than two miles beyond their corporate limits, without regard to the population limitations of this subsection."

Sec. 2. G.S. 160A-360(f) is amended by adding a new sentence at the end of the first paragraph to read:

"When either the Town of Aberdeen, the Village of Pinehurst, or the Town of Southern Pines annexes any area outside its corporate limits thus extending the area over which it would be allowed under subsection (a) of this section to exercise the powers granted by this Article, upon presenting proper evidence to the County Board of Commissioners that such annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing said municipality to exercise these powers within the extended area thus described."

Sec. 3. This act is effective upon ratification.

In the General Assembly read three times and ratified, this the 3rd day of June, 1985.

APPENDIX B

AN ORDINANCE PROVIDING FOR THE EXTRATERRITORIAL LIMITS OF THE VILLAGE OF PINEHURST FOR PURPOSES OF PLANNING AND ZONING, BUILDING INSPECTIONS AND SUBDIVISION REGULATIONS

BE IT ORDAINED AND ESTABLISHED by the Village Council of the Village of Pinehurst, Moore County, North Carolina, in regular session assembled on July 15, 1985, pursuant to General Statutes 160A-360 as follows:

SECTION 1. That the area of extraterritorial limits of the Village of Pinehurst shall be amended and extended as shown and delineated on the map prepared by C. H. Blue and Associates, which map is attached hereto, and correspondingly described in Exhibit "A" attached hereto and dated July 15, 1985.

SECTION 2. That the jurisdiction and authority of the Pinehurst Village Council for all purposes including adopting and enforcing zoning regulations, subdivision control regulations, and the enforcement of the North Carolina State Building Code, be extended to include the extraterritorial area defined in Section 1 hereof.

SECTION 3. This Ordinance shall be deemed to be in full force and effect from and after the 15th day of July, 1985 and approval by the Moore County Board of Commissioners for those areas where such approval is required.

Adopted this 15th day of July, 1985.

VILLAGE OF PINEHURST
VILLAGE COUNCIL

(Municipal Seal)

ATTEST:

By:/s/Edgar J. Roberts
Edgar J. Roberts, Mayor

/s/Melodie F. Frye
Melodie F. Frye, Village Clerk

Approved as to form:

/s/W. Lamont Brown
W. Lamont Brown, Village Attorney

APPENDIX C

LEGAL NOTICE

NOTICE OF PUBLIC HEARING.

VILLAGE OF PINEHURST.

NOTICE IS HEREBY GIVEN that a Public Hearing will be held by the Village Council of the Village of Pinehurst, North Carolina on Monday, July 8, 1985 at 4:00 p.m. in the World Golf Hall of Fame Auditorium, Pinehurst, North Carolina for the purpose of considering a proposed area for addition to the extraterritorial zoning jurisdiction of the Village of Pinehurst, North Carolina.

The boundaries of such area are defined as follows:

Proposed area for addition to extraterritorial zoning for the Village of Pinehurst, N.C.

Beginning at the intersection of .... [what follows is the metes and bound description].

A map showing the proposed area to be added to the extraterritorial zoning jurisdiction is on file and may be

inspected in the Office of the Village Clerk on Chinquapin Road, Pinehurst, North Carolina, between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday. All persons interested and wishing to be heard should be present in order that their opinions may be made a matter of record. A citizen may be present in person or represented by his authorized agent. If unable to be present, a citizen or his authorized agent may record his views by letter or memorandum delivered to the Village Clerk forty-eight (48) hours prior to the scheduled hearing.

Signed Melody F. Frye
Village Clerk
6:26, 7:3

APPENDIX D

CHAPTER 595 Session Laws - 1985

S.B. 469 **CHAPTER 595**

AN ACT TO REQUIRE THAT ZONING PROCEDURES INCLUDE A NOTICE REQUIREMENT.

The General Assembly of North Carolina enacts:

Section 1. G.S. 153A-343 is amended by adding a new sentence to read:

"The procedures adopted pursuant to this section shall provide that whenever there is a zoning classification action involving a parcel of land, the owner of that parcel of land as shown on the county tax listing, and the owners of all parcels of land abutting that parcel of land as shown on the county tax listing, shall be mailed a notice of the proposed classification by first class mail at the last addresses listed for such owners on the county tax abstracts. The person or persons mailing such notices shall certify to the Board of Commissioners that fact, and such certificate shall be deemed conclusive in the absence of fraud."

Sec. 2. G.S. 160A-384 is amended by adding a new sentence to read:

"The procedures adopted pursuant to this section shall provide that whenever there is a zoning classification action involving a parcel of land, the owners of all parcels of land abutting that parcel of land as shown on the county tax listing, shall be mailed a notice of the proposed classification by first class mail at the last addresses listed for such owners on the county tax abstracts. The person or persons mailing such notices shall certify to the City Council that fact, and such certificate shall be deemed conclusive in the absence of fraud."

Sec. 3. This act shall become effective October 1, 1985 and shall apply only when tax maps are available for the areas to be zoned.

In the General Assembly read three times and ratified, this the 4th day of July, 1985.

APPENDIX E

MINUTES OF THE PINEHURST VILLAGE COUNCIL

PUBLIC HEARING

July 8, 1985

The Pinehurst Village Council held a Public Hearing on Monday, July 8, 1985 at 4:00 p.m. in the World Golf Hall of Fame Auditorium for the purpose of considering (1) an amendment to the Zoning Ordinance to add to Section 4.1 R-SMF-4 and change R-SMF to R-SMF-6 and to change heading in 5.6 to "R-SMF-4 - Residential Single and Multi-Family District" and * * * ; (2) a request to rezone the Mystic Cottage, Lots 901, Old Town, from R-10 to OP-Office Professional; (3) a proposed area for addition to the extraterritorial zoning jurisdiction of the Village of Pinehurst, North Carolina. Those in attendance were:

Mr. Edgar J. Roberts, Mayor
Mr. Charles A. Grant, Mayor Protem
Mr. Ray E. Graichen, Treasurer
Mr. J. Ellis Fields, Jr.
Mrs. Marjorie S. Heller
Mr. George A. Wood, Village Manager
Mrs. Nancy Donahue, Planning and Zoning Board

Mrs. Melodie S. Frye, Village Clerk
and 35 people in the audience.

Absent:

Mr. W. Lamont Brown, Village Attorney

Mayor Roberts called the Public Hearing to order and advise that the Legal Notice had been published in The Pilot on June 26, 1985 and July 3, 1985.

Mayor Roberts asked the Village Clerk if she had received any written communication regarding any matter for the Public Hearing.

Mrs. Melodie Frye, Village Clerk, stated she had received only one letter, which she then read into the record. The letter from Harris Blake, dated July 8, 1985 is included as part of this record and is in the Minutes' Files.

* * *

[Discussion of the zoning ordinance amendments R-SMF-4 District and discussion of the rezoning of Mystic Cottage from R-10 to OP.]

Mayor Roberts opened the floor for discussion of the proposed area to be included in the extraterritorial zoning jurisdiction.

Counsel member Grant stated, "because there has been some confusion of articles in the press I would like to go through the zoning process. There has been a sense that the Village imposes zoning on people, actually it comes the other way. You are the ones that decide how you want property zoned. What has happened to date is that our Planning and Zoning Board has gone through and established what most of the uses are in the area concerned. We have not only covered the area that has recently been annexed, but the other area which will be part of our extraterritorial relief from the County. Part of this we have included in the Public Hearing, but Mrs. Louis Meyer's farm will go to Southern Pines. We have agreed with them that this line will come up along this point (he pointed on map). We included this piece of property in the Public Hearing Notice because you can go back from this line, but you cannot go up from it. The other pieces of property are ones Planning and Zoning Board have gone through and made recommendations for zoning. Now we have a Public Hearing and hear from you as to whether you agree with

the Planning and Zoning Board or have some objection to it. Following that we will try to weigh the balances of the various opinions about these pieces of property and proceed to establish the zoning from the Village which can be appealed either to the Board Adjustment or beyond to the Village Council. It is not anything that is imposed upon you. Everybody has a voice in it and then we will have opportunity to make some decision based on what we feel the strongest public opinion is about the area in question."

* * *

Mr. George Davis, of Midland Road, speaking as Chairman of Moore County Citizens for Better Zoning stated, "Back in July 1983, we presented a petition with 149 signatures of actual people who resided in this area we are talking about now, including the #6 Golf Course. All of these people favored to have zoning picked by Pinehurst for a distance of 1.3 miles which would go out to Dr. Neill Road and would take in all of #6 Golf Course. At that time, the State Law permitted only one mile extension by a municipality of less than 10,000 people, so we were stopped there. As you know, this process has been going for a whole year now. We have had many ups and downs. I think today is a real

joyful day because at last we have reached a point where it looks like the dye is cast and a decision will be made. I want you to know that the people in this area by a large majority are in favor of what you are about to do. During this process, of course, we have had legislative approval to go 2 miles which enables Aberdeen, Southern Pines and Pinehurst to agree upon a line of demarcation where the 2 miles overlap. We feel like this is a good step forth which will enable our area to zone the area in a manner compatible with the character of Pinehurst. We are opposed to high density developments. We realize that some of this property has been zoned under the County, prior to this point which makes it impossible for you to do anything about changing property that has already been platted. We feel like this will enable Pinehurst to protect us and maintain a desirable low density area. I want to compliment you and all the members of the Village Council and Mr. Wood who have been very supportive and worked closely with us and the Towns of Southern Pines and Aberdeen. I want to congratulate you on behalf of the organization."

* * *

[Mr. Harris Blake presented his proposals for some multi-family units and the zoning classification required for such a development.]

Mr. George Davis stated that what disturbs him is that there are 241 units on the northeast side of the traffic circle, Pinehurst Trace and 120 units on the southeast side of the Circle, Pinehurst Manor and across Midland Road from Mr. Blake's proposed project, Mr. Frank Maser proposes 38 units. He stated that from the standpoint of traffic eventually there will be one bad situation around the circle. He stated that these properties are already platted and he doesn't know what Pinehurst can do about it but it concerns him and a lot of people around the area.

Mrs. Stevie Edwards stated that she does not see how Mr. Blake can feel comfortable with the proposal unless he has the backing of the people surrounding the tract.

Mr. Blake stated that he respects his neighbors on this and he doesn't feel that when it is all over he will have enemies based on the project.

Mr. Larry Lyerly expressed concern over density if the property is zoned for multi-family and also expressed concern over the number of people and automobiles such a development would bring.

Mr. Carl Moser stated that he is sure that whatever Mr. Blake would do would enhance Pinehurst, but we do not know that Mr. Blake is always going to own the property. He stated that with the people sitting behind the property being zoned R-30 he does not see how the zoning could go below R-20. He stated that when multi-family housing goes in next to single family dwellings, the single family homes' value decreases.

* * *

There being no further discussion, the meeting adjourned at 4:58 p.m. upon motion of Council member Grant, duly seconded by Council member Fields and carried.

Respectfully submitted,

/s/Melodie F. Frye
Melodie F. Frye, Village Clerk